No. 05-

IN THE

Supreme Court of the United States

BENJAMIN W., and his parent PEGGY W.,

Petitioner,

v.

KINGSTON CITY SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROSA LEE CHARPENTIER
FAMILY ADVOCATES, INC.
209 Clinton Avenue
Kingston, New York 12401
(845) 339-8080

Attorney for Petitioner

197408

CP
COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Court of Appeals disregarded the individualized, unique needs of Benjamin W., contrary to 20 U.S.C. § 1400, *et seq.* of the Individuals With Disabilities Education Act (IDEA) in contradiction of this Court's decision in *Board of Education of the Hendrick Hudson Central School District Bd. of Ed., Westchester County v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), ("*Rowley*") which decision, if not reversed, will foster ad hoc encroachment upon the fundamental right to an appropriate education, where:

1. The court below erred in holding that unmitigated deference must be paid "to the [school] District" when reviewing decisions regarding the educational needs of disabled children; in granting such unprecedented expansion to the required deference standard, the Court below has tacitly and improperly reduced the requisite standard from a "preponderance of the evidence" to "any evidence".

2. The court below erred in affirming the District Court's decision to apply an expansive view of deference to the second-tier administrative review officer, obviating the Act's requirement for an independent judicial decision of evidence relevant to the questions posed by *Rowley*, an analysis of which, demonstrates that Petitioner's individualized, unique educational needs could not have been met under the School District's unsupported educational plan;

3. The Court of Appeals improperly expanded the deference requirement from that of sound educational policy to virtually any position asserted during administrative proceedings by any school district personnel. This case continues a trend in the Second Circuit to expand deference to areas well beyond that covered by traditional ruling-making, policy and methodology, now deferring all questions of student progress, segregation, educational benefit and least restrictive environment. Deference is now granted without any showing of educational expertise, scientific or peer-reviewed opinions; deference is now granted to school district and even to state officials who lack educational training. Moreover, the Second Circuit's opinion is in increased conflict with other Circuits, highlighting the need for uniformity and interpretive assistance from this Court.

4. The court below erred in not finding that Respondent failed to consider that Ben W., with reading skills at the 4th-5th grade level, could not benefit from placement into 10th grade, regular education, classes even with the use of supplementary aids and services.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases *Page*

Cited Authorities

Cited Authorities

Cited Authorities

Page

Statutes

Cited Authorities

Page

Regulations

House of Representatives

TABLE OF APPENDICES

OPINIONS BELOW

The Second Circuit's panel decision (HON. DENNIS JACOBS, HON. BARRINGTON D. PARKER, Circuit Judges. HON. JOHN GLEESON District Judge), which is unpublished at 04- 4044, is reproduced in the appendix hereto (App. A 1-4). The opinion of the United States District Court for the Northern District of New York, (Hurd, D.), is reproduced at (App. B 5-16). The opinion of the State Review Officer (Frank Munoz), is reproduced at (App. C 17-33). The opinion of the Impartial Hearing Officer (George Kandalakis), is reproduced at (App. D 34-53).

STATEMENT OF JURISDICTION

The District Court has jurisdiction under 20 U.S.C. § 1415(i)(3)(A). The judgment of the Court of Appeals was entered on July 25, 2005. This Court has jurisdiction to issue the writ under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This is a case, as was *Board of Education v. Rowley*, 458 U.S 176, 102 S. Ct. 3034 (1982), of statutory interpretation. The main issue is whether or not petitioners' rights as a parent and as a disabled child under the Individuals With Disabilities Education Act[1] (hereafter IDEA) were properly construed.

---

1. Amended by Congress as the Individuals with Disabilities Education Improvement Act of 2004, same cite.

In particular, 20 U.S.C. § 1415(i)(2), reads as follows:

2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements

In any action brought under this paragraph, the court -

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

STATEMENT OF THE CASE

The District Court's statement of Facts is insufficient to provide basis for a statement of the case, (App. B). The Court of Appeals did not review the factual findings of the District Court nor did it declare any to be clearly erroneous; rather, the Court of Appeals based the entirety of its factual conclusions on statements contained in the State Review Officer's decision, (App. A). The State Review Officer's decision, in conjunction with the Impartial Hearing Officer's decision provides the complete source for review of the underlying factual findings and can be relied upon by this Court.

Petitioner Benjamin W. was eighteen years old at the time of the District Court's decision of July 14, 2004, (App. D). Ben was eligible for special education and special services because of a severe language impairment, (App. D). He lives in the Kingston City School District.

In August 2000, respondent's the Committee on Special Education (CSE) recommended that petitioner's son be enrolled in a small class size of 12 disabled students, 1 special education teacher and 1 aide for English, math, science, and social studies. He was in ninth grade at the Kingston High School. The CSE further recommended he receive speech/ language therapy once per week; various program and testing modifications were included along with access to a computer for spell checking. The parent objected and in September 2000, the school district agreed to add 1 multisensory reading class and fund two independent educational evaluations. The student briefly attended the placement at the Kingston High School, but stopped attending in October 2000.

In October 2000, an audiologist evaluated Ben and diagnosed him with an auditory processing disorder. The audiologist recommended that the student be placed in a sound-controlled environment with as much individual teaching as possible. He also recommended use of a personal FM system.

The CSE reconvened on October 10, 2000. It again recommended a special class with a student: staff ratio of 12:1+1, as well as speech/language therapy, a writing lab, and multisensory reading. Physical education and art/music were the only regular education classes recommended. The CSE also recommended program modifications, testing modifications, and an exemption from the second language requirement. To investigate the boy's unwillingness to attend school, the CSE recommended a functional behavioral assessment be performed and a behavior intervention plan prepared. Petitioner rejected the program and requested that her son be placed at the Kildonan School. Ben continued to be out-of-school.

In December 2000, an independent evaluator with a doctorate in Learning Disabilities assessed Ben. She reported that Ben was of average intelligence, i.e. not borderline as suggested by the earlier school district evaluator, yet while entering the 10th grade, he was reading on a 5th grade level and writing at a 4th grade level. She recommended that the student be placed in an educational setting with a low student-to- teacher ratio, peers having similar IQs and social skills. She also recommended that the student's program be language-based, with teachers trained in an Orton-Gillingham technique. The evaluator offered decades of expertise and scientific support for the recommended intervention(s).

The CSE convened on December 19, 2000 to review the evaluator's recommendations. Without the recommended functional behavior assessment, or any other evaluation, the district's special education teacher opined that the student's perception that he was not a special education student was causing him to resist placement in the district's special education class.

In December 2000, and again in January 2001, the CSE recommended some home instruction service which the student continued to receive for the remainder of the 2000-01 school year. The CSE did not develop or provide the parent with an IEP to reflect this placement or services provided thereunder. As a placement, this option was the most restrictive and provided Ben no contact with peers, disabled or not. He did not earn high school credits sufficient to pass 9th grade.

The CSE convened on June 6, 2001 and prepared an IEP for the 2001-02 school year. In addition to recommending that the student remain classified as learning disabled, the CSE recommended a change in IEP placement to full-time placement into regular education classes with "inclusion" as his special education support. In addition to the regular education students and teacher, the classes would have involved a special education teacher and no more than 12 disabled students per class. Also, the CSE recommended that Ben receive individual speech/language therapy once every six school days for thirty minutes and indirect speech/language therapy consultation once per cycle in the classroom. It further recommended that he receive multisensory reading instruction once every six school days for 30 minutes each session, as well as indirect multisensory reading consultation to classroom teachers. Program modifications were continued.

Entering 10th grade, Ben was still reading at a 5th grade level. Petitioner rejected this proposed change in placement from small classes to regular education and the impartial hearing, state review and judicial appeals ensued.

PROCEEDINGS BELOW

Petitioners' request that Ben be allowed to attend a special school for students with dyslexia was denied by the school district in its "Individualized Education Program", IEP, in June 2001.

Petitioner requested a due process hearing pursuant to 20 U.S.C. § 1415(f)(1) to review the decision of the committee. The decision of the Impartial Hearing Officer, which decided that the school district's educational plan, or IEP, was not appropriate is contained in the decision of the hearing officer (App. D). The hearing officer did not direct a specific placement and Petitioner appealed to the State Review Officer, New York State's second-tier of administrative review.

The Respondent school district cross-appealed the Impartial Hearing Officer's decision. The decision of the State Review Officer, which reversed the hearing officer's findings as to the inappropriateness of the IEP is contained in (App. C).

Petitioner appealed to the United States District Court for the Northern District of New York. The District Court held that "while an argument could be made that the 2001-02 IEP did not provide Ben with the best educational services given his situation, there is sufficient support in the administrative record that the programming recommended

by the CSE and approved by the SRO satisfies the substantive requirement of the IDEA" (App. B 14). The District Court held that "all of the areas about which plaintiff protests – e.g. class size, peer group, type of instruction – involve questions of methodology more appropriately answered by the state and district decision-makers" (App. B 14). No citations to the record or specific facts were offered. The District Court granted the Respondent School District's motion for summary judgment concluding, "It cannot be said that the programming in Ben's 2001-02 IEP is not reasonably calculated to confer an educational benefit upon him. Any procedural flaws that accompanied the formulation of this IEP were minor in nature, and do not alone equate to the denial of a FAPE under the IDEA" (App. B15)).

On appeal to the Second Circuit, the Court of Appeals reduced Petitioners' claim to one of conflicting methodologies, finding: "privately hired experts recommended different teaching methodologies for Ben does not undermine the deference the Court must pay to the District". The Court granted deference to the District witness regardless of familiarity with the child, the child's disability or the relative qualifications of the witness. This effectively denies parents of disabled children their right to challenge the educational decisions made by their local school districts. The panel opinion is contained in the Appendix. (App. A 2-4).

Petitioners Peggy Watson, and her disabled son, Benjamin W., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit issued on July 25, 2005.

REASONS FOR GRANTING THE PETITION

The Second Circuit Court of Appeals, in its decision here, has created clearly confusing and conflicting law concerning the rights of disabled students under the Individuals with Disabilities Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* As this Court has pointed out in *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), Congress initiated legislation "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children . . .". 102 S. Ct. 3034, 3037. Subsequent legislation led to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 - 1487, with which this Petition is concerned.

It is of paramount public importance that the IDEA be properly construed so that Congress' intent to give disabled students equal access to a Free Appropriate Public Education, that addresses their unique needs, can be effectuated -not frustrated, by judicial intervention. The Act was passed in response to Congress' perception that the majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" HR Rep. No. 94-332, page 2 (1975) (HR Rep.) Under the IDEA, now the IDEIA, Congress provides substantial federal assistance to state and local educational institutions to assist in educating disabled children. In order to qualify and continue receiving funds, the states and the local educational institutions must comply with the extensive goals and procedures set out in the Act.

States are required to educate all disabled children regardless of the severity of their handicaps. 20 U.S.C. § 1412(a)(3)(A). The IDEA also requires States to provide for procedural safeguards for the handicapped students and their parents or guardians. 20 U.S.C. § 1415(a),(b)(1). The child's parents or guardians and the child, where appropriate, are written into the statute as major players in the formulation of the IEP as well as in any modifications thereto. Parents or guardians of handicapped children must be notified of any proposed change in "the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to such child," and must be afforded full opportunity to bring forward complaints about "any matter relating to" such evaluation and education. 20 U.S.C. § 1415(b)(6).

In *Rowley*, this Court indeed admonished that a district court should not "substitute its own notions of sound educational policy for those of the school authorities." *Rowley*, 458 U.S. 176, 206 (1982). However, the Court of Appeals for the Second Circuit has taken this admonition to an extreme. In *Rowley* this court made clear that while it is a court's obligation to give "due weight" to the administrative proceedings, this does not destroy the requirement that its decision ultimately be an "independent [one] based on a preponderance of evidence." *Id.* at 206-07. This was altogether ignored by the Court of Appeals here. Also ignored by the Court of Appeals was the *Rowley* explanation that "a 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by services as are necessary to permit the child 'to benefit' from the instruction." *Id.* at 188-89. The Court of Appeals here has assigned unmitigated deference to school districts and their state counterparts such

that no discussion or review of a child's benefit or failure to benefit from the instruction would be permissible.

The decision here eviscerates substantive entitlements previously afforded under special education law for parents of disabled children and for the children themselves. According to this Court of Appeals, a parent no longer has the right to challenge the basic educational decisions made for her disabled child by her local school district, (or a fact-finder that she never meets and that does not hear her case, i.e. the State Review Officer.) According to this Court of Appeals, the findings of the local impartial hearing officer are of no consequence; rather, courts are now directed to adopt the position of the school district whenever a substantive challenge is taken, i.e. challenges about class placement, size, peers and instruction. The educational needs of a disabled student need no longer be defined by science, medicine or expert opinion when in conflict with opinions asserted by the school district. According to the Court of Appeals, the parent's opinion, even when supported by several independent experts, must always be subordinated to that of a school district and/or state official; deference of this magnitude to agency official(s) has eliminated the purpose and meaning of judicial review.

In specifically nullifying independent scientific and expert reports, the court below also imposes a standard of review that abrogates the purpose and meaning of the Act's procedural safeguards. For example, the provision regarding the child's right to a second opinion regarding his disability and needed intervention, found at 20 U.S.C. § 1415(b)(1) under independent educational evaluation, has become an empty entitlement. It has rendered the Act's mandate for parental participation a farce, *see* 34 C.F.R. § 300.345. But

for the benefit of immediate notice of the school district's intent to propose a program for their child, parents will have no role at school-level committee meetings, 34 C.F.R. Appendix A to Part 300 question 5 (stating that parents are intended to be "equal participants." Their complaints and objections will be inconsequential and each complaint raised will be dismissed beyond the State Review Officer level.

According to the Court of Appeals here, the federal district court need not conduct an independent review, need not specifically consider the administrative record, except perhaps to note that it exists, and must defer to the agency's position. So long as the parents' claim relates to the "class-size, peer group, type of instruction" deference must be given to the school district – without further analysis. When brought through complaint procedures, deference is not due to the impartial hearing officer but only to the State's review officer. Applying the Court of Appeals rule here, a student's need(s) for appropriate education, if based upon independent expert opinion and evaluations may not be considered or valued by an independent Court. However, independent evaluations are available under the statute precisely because they provide support for the parents' opinions and us further the IDEA's goal of equal parental participation, 20 U.S.C. § 1415(a)(b)(1). When school authorities refuse to consider independent evaluations, they not only deny equal and meaningful input from the parents, they also exclude information potentially critical in ensuring that the child's unique needs are adequately addressed.

Credibility of witnesses is also devalued here by the Court, which ignored the hearing officer's findings. According to the Court of Appeals, an independent expert can never serve to undermine an opinion made by a public

school employee - regardless of the expert's education, training, and knowledge of the student and his disability.

Under the Court's analysis, parents may not dispute class size. Peer group, including the question as to how dissimilar the other children in a segregated class are, is now a matter of "methodology". This ruling creates a bar to parental challenges about the extent of mainstreaming, i.e. class size and peer group. Such severe restriction renders the IDEA requirement that disabled children be educated with non-disabled children "to the maximum extent appropriate," or in other words, in the least restrictive environment, off-limits to parental challenges and judicial review. *See* 20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.550.

The Court's ruling here also proposes a bar to the Act's provisions for unilateral placements. Until now, parents who disagreed with school authorities about the appropriateness of their child's placement under the IEP could unilaterally enroll the child in a private program and request retroactive reimbursement. *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *also see* 20 U.S.C. § 1412(a)(10)(C)(ii). Should deference to school district placement decisions, i.e. class size, peer group and type of instruction, become tantamount to the child's individual needs, this recourse to a unilateral private program shall be non-existent.

Indeed, should deference be mandated to apply to any and all decisions made by a school district as to class size, peer grouping, and/or type of instruction, parents need not attend school-based meetings, need not read their child's proposed service plans, or spend time engaging in an independent educational evaluation; finally, parents need not

engage in a futile hearing process. By imposing this degree of deference as a formal standard, the Court of Appeals eliminates the possibility of an "impartial" hearing. The ruling cripples Congressional purpose seen in the 1997 amendments to the IDEA; those amendments were clearly intent on magnifying, not diminishing, the role of parents in the education of children with disabilities. Federal regulations direct that parents be "equal participants" in the development of their child's IEP, 34 C.F.R. Appendix A to Part 300 question 5, *see also* 34 C.F.R. § 300.345. Parents' participation in the IEP process must be meaningful; they are to play "an active role" by "provid[ing] critical information" about their child, "express[ing] their concerns for enhancing the education of their child, and "join[ing] with" the IEP team "in deciding . . . what services the [public] agency will provide to the child. . . ." *Id.*

By drastically expanding the definition of educational policy and/or methodology to include such fundamental choices as "class size, peer group, type of instruction" the Court of Appeals has exterminated virtually all parental objections.

CIRCUIT CONFLICTS

Petitioner urges this Court grant Ben's Writ of Certiorari to address the profound disparity in treatment of children with disabilities nationwide. The Circuit Courts are divided on the degree deference and the conflict among them is ever-widening. In particular, disagreement with the Second Circuit decision here can be found in the opinions issued by the Fourth, Sixth, Ninth and D.C. Circuit Courts, see case summaries below. The rationale inherent in this Court's decisions to grant certiorari review as found in *United Gas*

Pipe Line v. Memphis L., G. & W. Div., 358 U.S. 152. 79 S. Ct. 194 (1959) and *United Steelworkers of America v. N.L.R.B.*, 376 U.S. 492, 84 S. Ct. 899 (1964) provide basis for this Court to grant Ben's Petition for Writ of Certiorari. The education of disabled children is of national importance. In both of these cases, this Court granted certiorari due to a conflict in a decision of this Court and the Courts of Appeal for other Circuit Courts, the District of Columbia Circuit [United Gas Pipe Line] and the Court of Appeals for the Second Circuit [United Steelworkers].

Petitioner shows that the opinion below creates a clear conflict between the Circuit Courts concerning the nature, degree and scope of deference required to be assigned to the opinions of school district personnel. The issue is confused and applied in seriously discrepant ways, with one court reviewing class size, peer group and type of instruction and another refusing to consider such issues. In the Second Circuit, the rule is different from that applied in the other Circuits and the magnitude of deference accorded by the Second Circuit to school authorities has risen above the individualized needs of the disabled student. The Circuit Court has progressively withdrawn judicial review from parents who challenge the decisions of public agencies. That there is disparate application of the deference issue among the Circuits is readily seen by review of several Circuit decisions.

The First Circuit held, in *Rafferty v. Cranston Public School*, 315 F.3d 21 (1st Cir. 2002), that the IDEA's deference standard "requires a more critical appraisal of the agency determination than clear-error review entails, but which, nevertheless, falls well short of complete de novo review" citing *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086

(1st Cir. 1993). Also see the First Circuit's finding that: "While the court must recognize the expertise of an administrative agency, as well as that of school officials, and consider carefully administrative findings, the precise degree of deference due such a finding is ultimately 'left to the discretion of the [examining] court.'" *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942 at 946 (1st Cir. 1991) (citation omitted).

In the Third Circuit, the Court has held that "[f]actual findings from the administrative proceeding are to be considered prima facie correct," *S.H. v. School Dist. of Newark*, 336 F.3d 260, 270 (3d Cir. 2003). There, the proper legal standard for the District Court to apply was a "modified de novo" review, in which courts give "due weight" to the administrative findings, *Id.*

In the Fourth Circuit, the rule is that "courts are required to make an independent decision based on a preponderance of the evidence, while giving due weight to state administrative proceedings." *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, at 103 (4th Cir. 1991). After giving the administrative fact-findings such due weight, if any, the district court then is free to decide the case on the preponderance of the evidence, as required by the statute, Id., at 105. This is in stark contrast to the Second Circuit's virtual directive to courts to adopt the position asserted by the school district. In *Doyle* the Fourth Circuit Court concluded that a state administrative appeals officer (reviewing the findings of the local hearing officer who conducted the hearing) violated the accepted norms of the fact-finding process by rejecting, on review of a cold record, the testimony of a witness that the hearing officer had found credible. This would confound the Watson holding which

negated the hearing officer's support for the testimony provided by the parent's independent educational expert. The Fourth Circuit concluded that the "due weight" requirement means that findings of fact by hearing officers in IDEA cases ". . . be considered prima facie correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it," *Id.* In *County Sch. Bd. v. R.P.* 399 F.3d 298 (4th Cir. February 2005) the Fourth Circuit Court wrote: "Nor does the required deference to the opinions of the professional educators somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether a given IEP is appropriate." *See also Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, at 384 (4th Cir. 2000) (holding that a federal action brought under the IDEA constitutes an independent civil action and not an appeal of the state administrative proceeding.)

The Fifth Circuit has ordered that the district court "must accord due weight to the hearing officer's findings, . . . but must ultimately reach an independent decision based on a preponderance of the evidence." *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000). "Thus, the district court's review is virtually de novo." *Id.* (*quoting Cypress-Fairbanks Indep. Sch. Dis. v. Michael F.*, 118 F.3d 245, 248, 252 (5th Cir. 1997)).

The Sixth Circuit also poses a position of the due deference issue that departs drastically from that pronounced here by the Second Circuit. The Sixth Circuit has declared that reviewing courts must not "simply adopt the state administrative findings without an independent re-examination of the evidence," *Doe ex rel. Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, at 387 (6th Cir. 1998). The Sixth Circuit has recently ruled that the amount

of weight due to administrative findings depends on whether the finding is based on educational expertise, *McLaughlin v. Holt Pub. Schs. Bd.*, 320 F.3d 663, at 669 (6th Cir. 2003). Moreover, the Sixth Circuit has held that the IDEA calls for a "modified de novo" standard of review, stating that "a district court is required to make findings of fact based on a preponderance of the evidence contained in the complete record, while giving some **deference** to the fact findings of the administrative proceedings" *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, at 764 (6th Cir. 2001). Mixed questions of law and fact, including the question of whether a child was denied a FAPE, are reviewed de novo. *Id.* at 766 (citing *Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 503 (6th Cir. 1998).

The Seventh Circuit has held that the IDEA requires that "a district court must independently determine whether the requirements of the Act have been satisfied" *Board of Educ. v. Illinois Bd. of Educ.*, 41 F.3d 1162, 1166 (7th Cir. 1994)

The Ninth Circuit, in *Ms. S. ex rel. G v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003) (overturned on other grounds), found that "[t]he standard of review in cases involving the IDEA is different from the standard normally employed by federal courts reviewing the decisions of administrative agencies . . . appellate courts give less deference than is normally the case to the administrative law judge's findings of fact." The Second Circuit requires the exact opposite, giving significantly more – not less, deference than normal. The Ninth Circuit "defined the evaluation of "due weight" as follows: The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored.

The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole." *Id.* at note 16, citing *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987) and *Ojai Sch. Dist. v. Jackson*, 4 F.3d 1467, 1473-74 (9th Cir. 1993). Also from the Ninth Circuit: the "due weight" to be given is within the discretion of the appellate court, *Union Sch. Dist. v. B. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994).

In the Tenth Circuit, the court has ruled that judicial review means the court must independently decide whether the IDEA requirements have been met. *Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 927 (10th Cir. 1995). "The district court must therefore independently review the evidence contained in the administrative record, accept and review additional evidence, if necessary, and make a decision based on the preponderance of the evidence, while giving 'due weight' to the administrative proceedings below." *Id.* (quotation omitted). This "due weight" standard means that the IHO's factual findings are considered prima facie correct. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004). Also, "[t]he district court's proceedings must maintain the character of review and not rise to the level of a de novo trial." *Id.*

The D.C. Circuit Court has held that the standard of review under IDEA is less deferential than that used in the traditional substantial evidence test in ordinary administrative review cases. *See, e.g., Kerkam v. McKenzie*, 274 U.S. App. D.C. 139, 862 F.2d 884, 887 (D.C. Cir. 1988) and *Kroot v. D.C.*, 800 F. Supp. 975, 981 (D.D.C. 1992).

The Second Circuit Court of Appeals decision here also conflicts with other Circuits with regard to the Court's overly comprehensive definition of educational policy and methodology, expanding these to include class size, peer group, and type of instruction, see District Court Judge Hurd's decision. (App. B) For example, judicial review as made by the Fourth Circuit in *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989), would be improper in the Second Circuit. In *DeVries*, the Fourth Circuit Court recognized that regular classes did not provide an "appropriate peer group academically, socially, or vocationally" for the student in question, *Id.*, 882 F.2d at 879. Such judicial consideration will now be barred in the Second Circuit, as conflicts on matters of "methodology", i.e. "peer group", are to be deferred to the school district.

Ultimately, the question of due weight and deference returns to a review of this Court's decision in Rowley. In *Rowley*, this Court noted that the District Court overruled the state administrative proceeding. 102 S. Ct. 3034, 3051. Concerning the standard of judicial review under 20 U.S.C. § 1415(e)(2), this Court stated the following:

> . . . the fact that § 1415(e) requires that the reviewing court 'receive the records of the administrative proceedings' carries with it the implied requirement that **due weight shall be given to these proceedings**. . . .

102 S. Ct. 3034, 3051 [emphasized by Petitioner].

In summary, because of its lack of rationale, conflict with other Circuit Court decisions and lack of legal basis, the opinion below cries out for review by this Court. It is clear

that further guidance is needed from this Court because of the incorrect interpretation of the Act by the court below. A correct construction of the Act is required by this Court so that the intent of Congress' mandate can be fulfilled. This is a matter of national importance affecting the educational rights of millions of disabled students.

CONCLUSION

For these reasons, Ben's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROSA LEE CHARPENTIER
FAMILY ADVOCATES, INC.
209 Clinton Avenue
Kingston, New York 12401
(845) 339-8080

Attorney for Petitioner

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JULY 25, 2005

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of July, two thousand five.

PRESENT: HON. DENNIS JACOBS,
HON. BARRINGTON D. PARKER,
Circuit Judges.
HON. JOHN GLEESON*
District Judge

04-4404

PEGGY WATSON, as a parent of a disabled student,

Plaintiff-Appellant,

-v.-

KINGSTON CITY SCHOOL DISTRICT,

Defendant-Appellee.

---

* The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

Appendix A

Appeal from the United States District Court for the Northern District of New York (Hurd *J.*).

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Plaintiff-Appeliant Peggy Watson appeals from a judgment of the United States District Court for the Northern District of New York (Hurd, *J.*) granting summary judgment in favor of the Kingston City School District and dismissing her complaint, which alleged that the District failed to provide her learning disabled son, Ben, with an appropriate education in violation of the Individuals with Disabilities in Education Act ("IDEA"). We assume that the parties are familiar with the facts, the procedural history, and the scope of the issues presented on appeal.

This Court reviews the district court's grant of summary judgment *de novo. See Young v. County of Fulton,* 160 F.3d 899, 902 (2d Cir.1998).

"The IDEA offers federal funds to states that develop plans to assure 'all children with disabilities' a 'free appropriate public education.'" *Grim v. Rhinebeck Cent. Sch. Dist.,* 346 F.3d 377, 379 (2d Cir.2003) (quoting 20 U.S.C. § 1412(a)(1)(A)). School districts must administer specialized services to disabled students according to an " 'individualized education program' ('IEP'), which school districts must implement each year for each student with a

disability." *Id.* (citing 20 U.S.C. § 1414). Disabled students are entitled to IEPs that: (1) comply with IDEA's procedural mandates, and (2) provide the meaningful education contemplated by IDEA. *Bd. of Educ. v. Rowley,* 458 U.S. 176, 199, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Watson argues that the 2001-2002 IEP developed by the District for Ben was both substantively inappropriate and procedurally defective and on that basis contests a state review officer's ("SRO") determination approving the IEP. In reviewing the SRO's determination, we "must give due weight to the administrative proceedings, mindful that the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." *Grim,* 346 F.3d at 380-81.

Watson alleges that the IEP was substantively inappropriate because: (1) it did not implement the recommendations of two private education experts, and (2) because, according to Watson, a private school education would provide Ben with an appropriate education. Watson's claim lacks merit. That privately hired experts recommended different teaching methodologies for Ben does not undermine the deference the Court must pay to the District. As this Court held in *Grim,* it is inappropriate to choose between views of "conflicting experts on a controversial issue of educational policy . . . in direct contradiction of the opinions of state administrative officers who had heard the same evidence." 346 F.3d at 383. Moreover, the District is simply "not required to furnish [] . . . every special service necessary to maximize each handicapped child's potential." *Grim,* 346 F.3d at 379 (internal quotation marks omitted). In short, the

2001-2002 IEP provided the "basic floor of opportunity" required by the IDEA. *See id.* (quoting *Rowley,* 458 U.S. at -201, 102 S.Ct. 3034).

Watson also raises procedural objections to the IEP. For example, Watson asserts that the District's failure to update the goals and objectives listed in the 2001-2002 IEP from that of the previous year rendered the IEP defective. In *Grim,* this Court rejected an almost identical procedural challenge (which was coupled with a procedural challenge to the school's delay in developing the IEPs at issue), holding that "the sufficiency of goals and strategies in an IEP is precisely the type of issue upon which the IDEA requires deference to the expertise of the administrative officers." *Grim,* 346 F.3d at 382. Moreover, as the district court found, the procedural defects alleged by Watson are minor and do not warrant IDEA relief. *Watson v. Kingston City Sch. Dist.,* 325 F.Supp.2d 141, 145 (N.D.N.Y.2004) (citing *Grim,* 346 F.3d at 381 ("[Not every] procedural error in the development of an IEP renders that IEP legally inadequate under the IDEA.")).

For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED.**

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK

By: s/ Lucille Carr
Lucille Carr, Deputy Clerk

APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED JULY 14, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:03-CV-370

PEGGY WATSON, as a parent of Ben Watson, a disabled student,

Plaintiff,

v.

KINGSTON CITY SCHOOL DISTRICT,

Defendant.

DAVID N. HURD
United States District Judge.

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

Plaintiff Peggy Watson ("plaintiff") brings this suit against defendant Kingston City School District ("District") alleging failure to provide her son, Ben, with a free appropriate public education ("FAPE"), in violation of the Individuals with Disabilities in Education Act, 20 U.S.C. § 1415(i)(2) ("IDEA"). Specifically, plaintiff contests a State

Appendix B

Review Officer's ("SRO") conclusion that her son's Individualized Education Program ("IEP") for the 2001-02 school year was appropriate.

Both parties have moved for summary judgment pursuant to Fed.R.Civ.P. 56.[1] Oral argument was heard on March 25, 2004, in Albany, New York. Decision was reserved.

II. FACTS

Ben was classified as learning-disabled by the District's Committee on Special Education ("CSE") in December 1993 due to auditory-language processing problems. (Docket No. 12, p. 1.) In accordance with the IDEA, the CSE developed yearly IEPs for Ben. (Docket No. 33, SD-6, 7, 10, 20, 33, 41) ("Admin.Rec.SD-_").

His disputed 2000-01 IEP, modified after settlement, provided that Ben: (1) be placed in special, non-inclusive classes for English, Math, Science and Social Studies with 12 students for 1 regular classroom teacher and 1 special education teacher, (2) receive speech/language therapy once a week, and (3) receive multi-sensory reading instruction. (Admin.Rec.SD-41, p. 1.)

On October 2, 2000, plaintiff sought an independent audiological evaluation from Professor Gertner ("Gertner") of Kean University. Gertner found that Ben had trouble hearing and repeating words. He recommended that Ben be

---

1. The parties, having agreed that this matter could be resolved on the administrative record, engaged in no discovery.

placed in a reading program that utilized Orton-Gillingham instruction ("O-G"), a form of multi-sensory reading instruction. Gertner also recommended that Ben be instructed in smaller, sound-controlled classrooms, with as much one-on-one instruction as possible. (Admin.Rec.SD-43.)

On October 10, 2000, the CSE suggested that Ben receive a behavioral evaluation because he was being disruptive in class. (Admin.Rec.SD-45.) Plaintiff asked the District to implement Gertner's recommendation that the school use the O-G method of instruction and that her son be placed in a private school, in order to negate the potential stigma of Ben being viewed as a special education student. *Id.* The District denied plaintiff's requests.

Ben spent approximately one month at a District school in the fall of 2000, before being removed from the District school by plaintiff. (Admin.Rec.SD-47.) He was subsequently home-schooled from October until December 2000, and then began tutoring sessions in January. *Id.* District teachers tutored Ben in all his classes except Math, for which he received instruction from his grandmother, a retired teacher. *Id.* Testimony below indicated that before voluntarily leaving the District, Ben voiced his concern and anger about being classified as a special education student, (Docket No. 29, pp. 67, 83-85), and that at plaintiff's request, the District had begun investigating the possibility of placing Ben in an "integrated" classroom setting, (Docket No. 18, p. 11.)

Plaintiff obtained a second independent evaluation from Dr. Phoebe Liss ("Liss") in December 2000. Liss also recommended that Ben receive O-G instruction in a small

classroom environment. (Admin.Rec.SD-49.) The CSE thought that Liss's recommendations could be applied within the District, although it was cognizant that Ben was concerned about being stigmatized for receiving special education services. Ben's home-schooling continued throughout the spring of 2001. (Docket No. 28, p. 4.)

In June 2001, the CSE developed Ben's 2001-02 IEP. In creating the IEP, the CSE considered Ben's auditory-processing needs and level of academic performance, as shown by his April 2000 WIAT and November 1999 WISC III scores. (Docket No. 41.) While not included in the IEP, additional material was assessed by the CSE, including Ben's IQ scores and successful English Regents exam results, Gertner's and Liss's independent evaluations, spring 2001 tutoring evaluations completed by District instructors, two psychology exams conducted by the District, and previous IEPs. (Docket No. 28, p. 6; Docket No. 29, pp. 65-67.) The District also discussed mainstreaming alternatives with plaintiff, Ben's potential need for an FM trainer, and preferential seating within classrooms. (Docket No. 28, p. 6; Docket No. 29, pp. 60-62, 247.)

Based on Ben's needs, the CSE developed a series of related objectives to assist Ben in progressing through the high school curriculum. These objectives focused on improving his language, mathematical, organizational, study, and attending skills. The CSE also provided Ben with special education services that would help him to successfully meet the IEP's objectives, while placing him in a less restrictive classroom environment. (Docket No. 41; Docket No. 29, pp. 36, 40.) These services included speech therapy and multi-

sensory education sessions to improve his vocabulary and comprehension skills. The IEP also stipulated that several classroom modifications would be put in place, such as repetition of material by the classroom instructor and modification of tests and assignments. (Docket No. 29.)

Ben's 2001-02 IEP specifically recommended that Ben continue to be classified as learning-disabled but that he be placed in a larger, more inclusive classroom setting. The CSE also stated that once every six school days he should receive one-on-one speech therapy for forty minutes and multi-sensory reading instruction for thirty minutes. (Docket No. 41.)

Plaintiff requested an impartial review of the 2001-02 IEP on July 1, 2001. She was particularly concerned that the IEP did not include appropriate academic and social peers for Ben. (Admin.Rec.SD-67.)

The impartial hearing officer ("IHO") reviewed the proposed IEP and found that it was inappropriate for Ben. (Docket No. 27, pp. 9-10.) Specifically, the IHO stated that the CSE had insufficiently developed Ben's IEP because (1) it had not personally observed him in the home-school setting, (2) the IEP was not created when Ben had started home-schooling, (3) it had not considered the recommendations of Gertner or Liss, or the prospect of Ben attending a private school, (4) the IEP did not include an assistive technology evaluation, and (5) the language instruction was not sufficient in length or frequency. *Id.* The IHO advised the CSE to revise the IEP based on his recommendations and to specifically consider implementing an O-G program of instruction. *Id.*

To address concerns about what she felt were ambiguities in the IHO's decision, plaintiff appealed to the State Review Officer ("SRO"). On November 25, 2002, the SRO reversed the finding of the IHO and reinstated the IEP. (Docket No. 28, p. 9.) The SRO found that the CSE had sufficient knowledge of Ben's needs and that the IEP sufficiently addressed those needs. *Id.* at 1-9. Specifically, the SRO found that because Ben's home-schooling was a temporary, interim placement, the CSE was not required to observe it. *Id.* at 6. An assistive technology evaluation was deemed unnecessary by the SRO. *Id.* The SRO also found that Ben did not need continuous O-G instruction throughout the day because his speech therapy and multi-sensory sessions would sufficiently address his disability. *Id.* at 8. The SRO regarded the IEP's comprehensive approach of combining special education sessions with in-class modifications as "especially significant for this student, in view of his feelings about being identified as a student with a disability." *Id.*

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Richardson v. N.Y. State Dep't of Corr. Servs.*, 180 F.3d 426, 436 (2d Cir.1999). Facts, inferences therefrom, and ambiguities must be viewed in a light most

favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, however, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56; *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505. At that point, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec.*, 475 U.S. at 586, 106 S.Ct. 1348. Indeed, to withstand a summary judgment motion, the nonmoving party must demonstrate that sufficient evidence exists upon which a reasonable jury could return a verdict in its favor. *Anderson*, 477 U.S. at 248-49, 106 S.Ct. 2505; *Matsushita Elec.*, 475 U.S. at 587, 106 S.Ct. 1348.

B. IDEA

The purpose of the IDEA is to provide all disabled students with a FAPE. 20 U.S.C. § 1400(d). States receive federal funding for complying with the IDEA by developing specialized education plans and services for students with disabilities (IEPs). 20 U.S.C. § 1412(a)(1)(A). The IDEA also mandates schools provide a FAPE to students in the least restrictive environments available, to be achieved primarily through mainstreaming disabled students into non-disabled classroom settings. The only exception to the mainstreaming requirement is when "the nature or severity of the handicap is such that education in regular classes . . . cannot be achieved satisfactorily." 20 U.S.C. §§ 1412(a)(5), 1412(5);

see also Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377 (2d Cir.2003); *Wall v. Mattituck-Cutchogue Sch. Dist.*, 945 F.Supp. 501 (E.D.N.Y.1996).

While the IDEA requires districts to provide appropriate education to disabled students, this is not necessarily synonymous with offering disabled students the best educational opportunities available. The IDEA only requires that districts give disabled students a "basic floor of opportunity . . . consisting of access to specialized institutions and related services which are individually designed to provide educational benefit." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

The Supreme Court in *Rowley* held that the IDEA offered disabled students both procedural and substantive guarantees. 458 U.S. at 192, 102 S.Ct. 3034. Specifically, school districts must (1) comply with certain procedural mandates in the statute when formulating an IEP for a disabled student, and (2) ensure that the substantive contours of the IEP adopted are reasonably calculated to confer an educational benefit upon the child. *Id.* The District's compliance with these two requirements—both alleged by plaintiff to be unsatisfied—will be discussed in reverse order.

1. *Substantive Challenges to IEP*

Plaintiff alleges that the 2001-02 IEP is substantively inappropriate, in essence, because it did not implement Gertner's and Liss's recommendations. Plaintiff is

particularly concerned that the IEP did not include O-G instruction or appropriate intellectual and social peers for Ben. (Docket No. 28, p. 5; Docket No. 18 p. 19.) She claims that the Kildonan School, a private school specializing in educating dyslexic students, would provide Ben with an appropriate education. *Id.*

The administrative record and rulings are crucial in determining the appropriateness of Ben's IEP because a Court's ability to review administrative hearings, regarding whether a district has complied with the IDEA, is restricted. *Sherman v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87, 93 (2d Cir.2003). Judges are not trained educators and are required to afford significant deference to State educational agencies' decisions, 20 U.S.C. 1415(b), 1415(c), without "imposing their view of preferable educational methods upon the states." *Rowley*, 458 U.S. at 207, 102 S.Ct. 3034. Any questions regarding appropriate methodology are left to individual states to decide. *Doe v. Bd. of Educ. of Tullahoma City Sch.'s*, 9 F.3d 455, 458 (6th Cir.1993) ("[The IDEA] giv[es] utmost deference to specific educational decisions once it is determined that they stem from the procedures outlined in the Act."). This deference to the final decision issued by a state agency on an issue of educational methodology is no less appropriate simply because the SRO has disagreed with the IHO. *Karl v. Bd. of Education of Geneseo CSD*, 736 F.2d 873, 877 (2d Cir.1984) ("We believe *Rowley* requires that federal courts defer to the final decision of the state authorities a..d that deference may not be eschewed merely because a decision is not unanimous or the reviewing authority disagrees with the hearing officer"); *see also Mavis ex rel. Mavis v. Sobol*, 839 F.Supp. 968, 986 (N.D.N.Y.1993).

Appendix B

Here, while an argument could be made that the 2001-02 IEP did not provide Ben with the best educational services given his situation, there is sufficient support in the administrative record that the programming recommended by the CSE and approved by the SRO satisfies the substantive requirement of the IDEA. Quite simply, all of the areas about which plaintiff protests—e.g., class size, peer group, type of instruction—involve questions of methodology more appropriately answered by the state and district decision-makers.

The SRO specifically examined plaintiff's concerns and found that the IEP appropriately identified and considered them, developed adequate objectives, and provided educational services that would allow Ben to attain his objectives. (Docket No. 28, pp. 7-9.) It was noted that O-G instruction would not fully address Ben's needs because it is a form of multi-sensory education that focuses primarily on phonics, whereas his reading difficulties are with comprehension. *Id.* at 8. The SRO therefore held that plaintiff's request for private O-G instruction was unwarranted because Ben's objectives could be successfully met with the District's more comprehensive use of multi-sensory education. *Id.* These conclusions cannot and will not be disturbed.

The mere fact that a separately hired expert has recommended different programming does nothing to change this, as deference is paid to the District, not a third party. *See Pascoe v. Washingtonville Cent. Sch. Dist.*, No. 96 Civ. 4926, available at 1998 WL 684583 (S.D.N.Y. Sept. 29, 1998) (holding that recommendation that a student be given private

O-G instruction did not, in itself, invalidate substantive recommendations in IEP); *see also Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 567 (2d Cir.1989) (stating that an IEP need not confer "everything that might be thought desirable by loving parents"). So long as the administrative record provides sufficient support that the substantive contours of the IEP are reasonably calculated to confer educational benefits, as it does here, it is not within a Court's purview to upset the programming recommended by the CSE.

2. *Procedural Challenges to IEP*

Although plaintiff also lodges procedural challenges to the formulation of the IEP under the first *Rowley* factor, the defects in this regard, if any, were minor and, given the substantive propriety of the IEP, do not rise to a level where relief under the IDEA is appropriate. *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 (2d Cir.2003) ("[not every] procedural error in the development of an IEP renders that IEP legally inadequate under the IDEA."); *Evans v. Bd. of Educ. of Rhinebeck Cmty. Sch. Dist.*, 930 F.Supp. 83, 93-94 (S.D.N.Y.1996) ("procedural flaws do not automatically require a finding of a denial of a free appropriate education . . .").

IV. CONCLUSION

It cannot be said that the programming in Ben's 2001-02 IEP is not reasonably calculated to confer an educational benefit upon him. Any procedural flaws that accompanied the formulation of this IEP were minor in nature, and do not alone equate to the denial of a FAPE under the IDEA.

Accordingly, it is

ORDERED that

1. Defendants' motion for summary judgment is GRANTED;

2. Plaintiff's cross-motion for summary judgment is DENIED; and

3. The complaint is DISMISSED.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/ David N. Hurd
District Judge

Dated: July 14, 2004
Utica, New York.

APPENDIX C — DECISION OF THE UNIVERSITY OF THE STATE OF NEW YORK DATED NOVEMBER 25, 2002

THE UNIVERSITY OF THE STATE OF NEW YORK
The State Education Department
State Review Officer

No. 02-038

Application of a CHILD WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the City School District of the City of Kingston

Appearances:

Family Advocates, Inc., attorney for petitioner, RosaLee Charpentier, Esq., of counsel

Shaw & Perelson, LLP, attorneys for respondent, Michael K. Lambert, Esq., of counsel

DECISION

Petitioner appeals from an impartial hearing officer's decision denying her request for an order requiring respondent to place her son in a private school, notwithstanding the hearing officer's determination that the individualized education plan (IEP) that respondent's Committee on Special Education (CSE) had prepared for the student was deficient. Petitioner agrees that the IEP was inappropriate, and she asserts that the hearing officer should

have directed the school district to place her child in a program at a private school of petitioner's choosing. Respondent cross-appeals from the hearing officer's determination with respect to the student's IEP. The appeal must be dismissed. The cross-appeal must be sustained.

Petitioner's son attended a private school for kindergarten and first grade (Exhibits 4 and 5). He entered respondent's schools for second grade during the 1993-94 school year (Exhibit 2). The student was referred to the CSE for an evaluation because of low achievement, reading difficulty and speech/language difficulty (Exhibit 3). The CSE recommended that he be classified learning disabled and speech impaired, and that he receive resource room services, speech language therapy, and testing modifications (Exhibit 6). For third grade, the CSE recommended that the student be placed in a special class for part of the day, while continuing to receive speech/language therapy and testing modifications (Exhibit 7). Petitioner removed her child from public school in the middle of third grade, and chose to home school him (Exhibit 11). The school district provided speech language consultant services to the student at home (Exhibit 32).

For fourth grade, the CSE recommended that petitioner's son be classified as learning disabled and be enrolled in a full time special class, while continuing to receive speech/language therapy and testing modifications (Exhibit 10). Petitioner requested an independent evaluation. Subsequent to the evaluation, the CSE adhered to its recommendation for a full time special class, as well as speech/language therapy and testing modifications (Exhibit 11). Petitioner

opted to home school her child (Exhibit 17). The district continued to provide speech/language consultant services at home (Exhibit 32).

In May 1996, the CSE recommended fifth grade placement in an inclusion program with resource room one period per day, speech/language therapy three times per week, and testing modifications (Exhibit 20). The student began fifth grade in respondent's schools. In November 1996, the CSE recommended a special class with a student: teacher ratio of 12:1+1, as well as speech/language therapy and testing modifications (Exhibit 24). In January 1997, petitioner unilaterally placed her child in a private school. Petitioner requested that the district pay tuition and transportation costs because her son's needs could not be met in the placements recommended by the CSE. The request was denied, but the CSE did offer to provide resource room services and speech language therapy. Petitioner declined the offer (Exhibits 25 and 26). The student attended private school for sixth and seventh grades. The district provided tutoring services at the private school during sixth and seventh grade (Exhibits 30 and 33).

In May 1999, the CSE recommended that the student remain classified as learning disabled. For eighth grade during the 1999-2000 school year, it recommended a daily special education class for reading and language, resource room services each day in a special location, and a multisensory reading class each day. The program also included a speech/language consult, program modifications, test modifications, and access to spellcheck (Exhibit 33). Instead, petitioner enrolled her son in a private school for eighth grade (Exhibit 39).

Appendix C

The CSE's triennial evaluation of the student was performed in the fall of 1999 and spring of 2000. On the Wechsler Intelligence Scales for Children - III (WISC-III), the student achieved a verbal IQ score of 78, a performance IQ score of 81 and a full scale IQ score of 77. The scores indicated that the student was functioning in the borderline range of intellectual ability. On the Wechsler Individual Achievement Test (WIAT), he achieved a reading composite grade equivalent of 5.7, a standard score of 84 and a percentile of 14 as well as a math composite grade equivalent of 5.3. a standard score of 75. and a percentile of 7. In written language, he achieved a writing composite standard score of 77. a grade equivalent of 44 and a percentile of 6. The evaluator noted that the student's ability to decode words had improved significantly, while his math computation skills had declined slightly since the previous administration of the WIAT in 1999. She reported that the student did not demonstrate the 50 percent discrepancy between actual and expected achievement necessary for a classification of learning disabled, but she noted that classroom performance should also be considered (Exhibit 36).

A speech/language evaluation was conducted in April 2000. On the Peabody Picture Vocabulary Test-Revised (PPVT-R), the student achieved a score in the low average range. On the Expressive One Word Picture Vocabulary Test (EOWPVT), he achieved a score in the below average range. The evaluator noted that the student did not achieve a basal score of eight consecutive correct responses. On the Clinical Evaluation of Language Fundamentals (CELF-3), the student achieved scores in the below average range for all subtests evaluating receptive language skills. For expressive language,

he achieved a below average score on the formulating sentences subtest. The student achieved a score in the poor range on the recalling sentences subtest and an average score for sentence assembly. On the subtest that evaluated the student's ability to listen to paragraphs, he achieved a score in the poor range. The evaluator reported that the student exhibited severe receptive and mild expressive language delays, and she recommended the continuation of speech/ language services on a consultant basis (Exhibit 37).

In August 2000, respondent's CSE recommended that petitioner's son be enrolled in a 12:1+1 special education class for English, math, science, and social studies in the Kingston High School. It further recommended he receive speech/language therapy once per week, various program and testing modifications, and have access to a computer with a spell checking program (Exhibit 41). In September 2000, the parties agreed that he would also receive multisensory reading instruction. The student briefly attended the Kingston High School, but was reportedly home schooled beginning in October 2000 and subsequently received home instruction.

A private audiological evaluation was conducted on October 2, 2000. The audiologist found that the student had a weakness in differentiating speech sounds, which caused difficulty with auditory decoding and phonics. He also demonstrated difficulties distinguishing the main signal from background noises, a weakness in auditory memory and sequencing, and a left ear weakness which the audiologist interpreted as an indication of dysfunction in the developmental growth of the auditory system and confirmation of an auditory processing disorder. The

audiologist recommended that the student be placed in a sound controlled environment with as much individual teaching as possible. He also recommended use of a personal FM system (Exhibit 43).

The CSE reconvened on October 10, 2000. It again recommended a special class with a student: staff ratio of 12:1+1, as well as speech/language therapy, a writing lab, and multisensory reading. Physical education and art/music were the only regular education classes it recommended. The CSE also recommended program modifications, testing modifications, and an exemption from the second language requirement. Finally, the CSE recommended a functional behavioral assessment be performed and a behavior intervention plan be prepared. Petitioner rejected the program and requested that her son be placed at the Kildonan School (Exhibit 45). Ultimately, the mother chose to home school her child (Exhibit 47).

In December 2000, an independent evaluator reported that the student had achieved scores of 90 for verbal reasoning, 109 for abstract/visual reasoning, 110 for quantitative reasoning, 87 for short term memory, and a test composite score of 99 on the Stanford-Binet Intelligence Scale. On the Woodcock Reading Mastery Test (WRMT), the student achieved grade equivalents (and standard scores) of 6.4 (91) for word identification, 10.0 (103) for word attack, 5.3 (84) for word comprehension, and 5.6 (87) for passage comprehension. On the Wide Range Achievement Test (WRAT), the student achieved grade equivalents (and standard scores) of 5 (86) for spelling, and 6 (90) for arithmetic. However, the student's performance on the

Appendix C

Peabody Individual Achievement Test (PIAT) yielded a grade equivalent (and standard score) of 4.4 (84) for math. On the Test of Written Language (TOWL), the student achieved a standard score of 76 (5th percentile). The independent evaluator recommended that the student be placed in an educational setting with a low student: teacher ratio, with peers having similar IQs and social skills. She also recommended that the student's program be language based, with teachers trained in the Orton-Gillingham technique. Finally, the evaluator recommended intervention by a language therapist to improve vocabulary and language usage (Exhibit 49).

When it met on December 19, 2000 to review the independent evaluator's report, the CSE noted that many of the evaluator's recommendations could be implemented in the district's schools. The student's special education teacher opined that the student's perception that he was not a special education student was causing him to resist placement in the district's special education class. The CSE recommended four weeks of home instruction for the student, during which the mother would observe an inclusion class. The meeting was adjourned until after the mother observed the inclusion class (Exhibits 50 and 54).

On January 4, 2001, the mother and the district arrived at a settlement agreement with respect to the 1999-2000 school year and the first semester of the 2000-01 school year. The parent agreed to accept the IEP developed in August. The district agreed to provide one-two periods per week of Orton-Gillingham instruction, pay the parent $5600, fund the expense of an independent evaluation, and contribute up

to $250 toward additional testing (Exhibit 55). The CSE met on January 11, 2001 with petitioner, who indicated that she would be unable to observe the inclusion class and suggested that the independent evaluator observe at district expense. The CSE recommended continuation of home instruction until the observation could lake place (Exhibit 57). The student continued to receive home instruction for the rest of the 2000-01 school year.

The CSE convened on June 6, 2001 to prepare the student's IEP for the 2001-02 school year. In addition to recommending that the student remain classified as learning disabled, the CSE recommended that he be placed full time in an integrated, i.e., inclusion, class with a student: staff ratio of 12:1+1. To address the student's auditory processing difficulties, the CSE recommended that he receive individual speech/language therapy once per cycle for thirty minutes and indirect speech/language therapy consultation once per cycle in the classroom. It further recommended that he receive one period of individual multisensory reading instruction per cycle, as well as 40 minutes of indirect multisensory reading consultation in the classroom. Program modifications included modified classroom tests and assignments, and the reduction of math problems by one-half. Testing modifications included revised format, answers recorded, directions read, and tests read. Access to a computer with spell check was also recommended, and the IEP provided that the student would be exempt from the second language requirement (Exhibit 66).

In a letter dated July 2, 2001, petitioner requested an impartial hearing, because she believed that the

recommended placement did not include suitable social and intellectual peers for her son (Exhibit 67). The hearing began on October 10, 2001 and concluded on December 13, 2001. In his decision dated March 6, 2002, the hearing officer held that the IEP was inappropriate because it did not meet the student's individual needs. He found that the proposed integrated class placement constituted a significant change of placement for the student, and that a representative of the district should have observed the student in his current placement of home instruction before the CSE made its recommendation. The hearing officer further found that the CSE failed to develop an IEP when the student entered the home instruction program, failed to properly consider the two independent evaluations, failed to conduct an assistive technology evaluation to determine the need for an FM trainer, failed to consider private school placements as an option, failed to provide transition services when the student left school, and failed to provide an adequate reading and language arts program.

The hearing officer ordered the CSE to assess the student's Orton-Gillingham program to determine his exact level of achievement, revise the IEP to insure that the student receive the appropriate amount of Orton-Gillingham instruction, develop a transition plan for the student's entry into the high school, review course credits and develop an appropriate IEP, develop a written program for training of regular education teachers, conduct a behavioral assessment and create a behavioral implementation plan, conduct an assistive technology evaluation, and consider private school placements.

Appendix C

I will first consider respondent's cross-appeal. A board of education bears the burden of demonstrating the appropriateness of the program recommended by its CSE (*Application of a Child Suspected of Having a Disability*, Appeal No. 93-9; *Application of a Child with a Handicapping Condition.* Appeal No. 92-7; *Application of a Handicapped Child*, 22 Ed Dept Rep 487 [1983]). To meet its burden, a board of education must show that the recommended program is reasonably calculated to confer educational benefits (*Bd. of Educ. v. Rowley*, 458 U.S. 176 [1982]). The recommended program must also be provided in the least restrictive environment (34 C.F.R. § 300.550[b]; 8 NYCRR 200.6[a][1]). An appropriate program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals and short-term instructional objectives related to those needs, and provides for the use of appropriate special education services (*Application of a Child with a Disability*, Appeal No. 93-12; *Application of a Child with a Disability*, Appeal No. 93-9).

The first issue to be decided is whether the CSE had adequate information about the student to prepare his IEP. The student's IEP lists the student's WIAT scores from April 2000 and his WISC-III scores from the fall of 1999. It also includes the April 2000 speech/language test results. The IEP does not include the test results reported by the independent evaluator in December 2000, nor does it include the results of the private audiological evaluation performed in October 2000. I note that the auditory evaluator reported that the student had deficits in auditory memory and sequencing which would affect the student's ability to acquire new information. The student's IEP indicates that difficulties in

his auditory language processing affect his ability to understand and process new concepts. I further note that at the hearing, respondent's speech/language therapist described general classroom strategies for students with auditory processing difficulties. She testified that the CSE had discussed the student's possible need of an FM trainer, and had considered the parent's concern regarding her son's reaction to use of a device which would identify him as a classified student (Transcript pp. 244-247). The hearing officer's finding concerning a need for an assistive technology evaluation appears to have been with reference to an FM trainer. I cannot agree with the hearing officer that such an evaluation was necessary.

The independent evaluator assessed the student's cognitive skills with the Stanford-Binet, and reported scores that were higher than those the student had achieved on the WISC-III in 1999. I note that the latter results were consistent with the results of previous cognitive assessments (Exhibits 15 and 23), and that the independent evaluator indicated that she had not included the Stanford-Binet subtest score for short-term memory when recalculating results to arrive at an IQ score of 103. Different test instruments were used by the district's psychologist and the independent evaluator. The district presented written evidence explaining that some discrepancy in scores on the two tests favoring higher scores on the Stanford-Binet was the result of more recent standardization dates on the WISC –III (Exhibit 68). A comparison of the standardized achievement test results from April 2000 that appeared on the IEP with those reported by the independent evaluator in December 2000 reveals no significant differences. I find that the CSE's decision not to

include the results reported by the independent evaluator on the student's IEP does not afford a basis for finding that the IEP is deficient. A CSE is required to consider the results of an independent evaluation (8 NYCRR 200.5[g][1][v][a]). The record indicates that the CSE considered the independent evaluator's report (Transcript p. 122).

I have considered the hearing officer's finding that the CSE should have observed the student receiving home instruction before recommending his placement in an inclusion class, and I cannot agree with his finding. The CSE had initially recommended that the student be placed in a 12:1-1 special education class for academic instruction during the 2000-01 school year. The record reveals that the student did attend that class briefly during that school year, but disliked being in that class because he had difficulty being identified as student with a disability. Thereafter, petitioner and the CSE explored the possibility of a placement in an inclusion class. As a temporary measure, they agreed that he should receive home instruction. Although that temporary placement extended for longer than either party wished, it was nevertheless an interim placement. The inclusion placement that the CSE recommended for the 2001-02 school year would have provided special education instruction to the student on a 12:1+1 basis in the setting of a larger classroom that included regular education students. The student's special education instruction would have been provided with the smile pupil: teacher ratio as in the class he had attended at the beginning of the 2000-01 school year.

The student's former special education teacher and home instructor during the 2000-01 school year participated in the

June 6, 2001 CSE meeting, and testified at the hearing about the student's needs and current levels of performance (Transcript pp. 72-79). He explained how the student's IEP goals had been prepared (Transcript pp. 102-105). I find that the goals and objectives contained in the student's IEP appropriately reflected the student's needs. The evaluations revealed that the student had severe language difficulties (Exhibits 37 and 43). Four goals addressed language. One goal pertained to oral language. The six corresponding objectives addressed the student's ability to follow oral directions, retain oral information, demonstrate comprehension, utilize skills to assist in auditory recall, demonstrate an understanding of positional and spatial concepts and demonstrate an understanding of antonyms and synonyms. Two goals addressed written language. The corresponding objectives pertained to grammar, writing in a group, letter writing, and summarizing books. A fourth language goal addressed comprehension. The corresponding objectives pertained to identification of "signal words and phrases," determination of order, identification of main ideas and details, discrimination of fact from opinion, and interpretation of newspaper articles. I find that the language goals and objectives appropriately addressed the student's needs.

The remaining goals pertained to mathematical concepts, organization and study skills, and attending skills. The corresponding math objectives addressed the use of fractions. The corresponding objectives for organization and study skills addressed the student's utilization of time, recognition of needs, and ability to seek assistance. The corresponding objectives pertaining to attending skills addressed the

student's ability to remain on task and follow directions (Exhibit 66). I find that the goals and objectives pertaining to mathematical concepts, organization and study skills, and attending skills were appropriate.

I have found that the CSE had adequate information about the student's needs and his current levels of performance, and that it prepared IEP goals and objectives that were related to those needs and levels of performance. I must now determine whether it recommended appropriate special education services to afford the student a reasonable opportunity of achieving his goals and objectives. The parties agree that the student has language based learning disabilities and would benefit from a multisensory method of instruction. The student's reading difficulties are largely with regard to comprehension. He has made progress in decoding, and standardized test scores indicate that his decoding skills are at or near grade level. In view of his age and skill level, the student's comprehension skills should be developed in his content area courses, rather than in isolation.

Although the parties agree that the student would benefit from multisensory instruction, they appear to disagree about the meaning of the term and its relationship to the Orton-Gillingham reading program, which is a sequentially based progression of phonics. Multisensory instruction, as implied by its name, uses more than one of a student's senses to impart knowledge. It is a practice which most teachers use on a regular basis. While the term is often used in describing the instructional approach used with the Orton-Gillingham curriculum, it is not synonymous with that program, and it is not limited to reading instruction. Although some of

petitioner's witnesses opined at the hearing that Orton-Gillingham should be used as a methodology with her son throughout the school day, I find that there is no basis in fact for that opinion. As noted above, the student's current reading difficulty is with comprehension rather than phonics and decoding.

In addition to reading difficulties, the student has auditory processing deficits affecting his ability to comprehend spoken language and to formulate sentences. He needs repetition during instruction through preteaching and review, and he requires modifications to his instructional materials. His IEP provides for program modifications. At the hearing, the student's home instructor described strategies used by inclusion class teachers to address weaknesses in auditory comprehension, such as repetition and informal questioning to ascertain a student's level of comprehension in a manner that allows him to be part of the group and not feel singled out. That is especially significant for this student, in view of his feelings about being identified as a student with a disability.

The multisensory reading teacher described how her services would be coordinated with those of the speech/language therapist to improve the student's vocabulary and his comprehension. She also testified as to how she would have addressed the student's IEP objectives. I have considered the hearing officer's directive to the CSE to train mainstream teachers to incorporate a language based curriculum into their instruction. I must note that the term "language based curriculum" was not specifically defined by the hearing officer or petitioner's witnesses. In any event, it is clear from

the testimony of respondent's witnesses, as described above, that the proposed program would have addressed the student's language needs in a comprehensive manner.

There is no doubt that petitioner's son requires specialized instruction to address the aspects of his disability that prevent him from performing successfully in a regular education environment. However, it does not follow that such special education instruction must be provided in a private school. Respondent is required to offer special education instruction to the student in the least restrictive environment. In addition to that legal requirement, the CSE was also well aware of the student's feelings about being in a special education program. I find that the recommended inclusion class, with the additional supportive services that the CSE recommended, would have afforded the student a reasonable opportunity of achieving his IEP goals and objectives. Consequently, I find that respondent has met its burden of proof with respect to the educational program it offered to provide during the 2001-02 school year.

Having found that respondent has established the appropriateness of the educational program recommended by the CSE, I must find petitioner's objection to the hearing officer's decision is without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

Appendix C

IT IS ORDERED that the hearing officer's decision is hereby annulled.

Dated: Albany, New York

November 25, 2002

FRANK MUÑOZ

APPENDIX D — HEARING OFFICERS REPORT OF THE STATE OF NEW YORK, COUNTY OF ULSTER DATED MARCH 6, 2002

STATE OF NEW YORK: COUNTY OF ULSTER

IN THE MATTER OF A CHILD WITH A DISABILITY,
B.W. BY HIS PARENTS,

MR. & MRS. W. W., PETITIONER
REPRESENTED BY
FAMILY ADVOCATES, INC.
ROSALEE CHARPENTIER, ESQ.

AGAINST,

THE KINGSTON CITY SCHOOL DISTRICT,
RESPONDENT

REPRESENTED BY
SHAW & PERELSON, LLP
MICHAEL K. LAMBERT, ESQ.

BEFORE
GEORGE KANDILAKIS
IMPARTIAL HEARING OFFICER
March 6, 2002

Procedural Information

The persons in parental relationship of BW, a child with a disability, formerly requested an impartial hearing on July 2, 2001 against the Kingston City School District.

Appendix D

The parents of BW was represented by Ms. Rosalee Charpentier, Esq. of the Family Advocacy, Inc.

The Kingston City School District was represented by Mr. Michael K. Lambert, Esq. of Shaw & Perelson, LLP.

I, George Kandilakis, was appointed to serve as the impartial hearing officer by the Board of Education of the Kingston City School District on July 12, 2001.

The parents attended a Committee on Special Education [CSE] meeting on June 6, 2001, and received the recommendations of the CSE in the form of the Individual Educational Program [IEP] on or about July 19, 2001. The request for an impartial hearing was over disagreement regarding BW's placement for the 2001-2002 school year.

The dates of the Impartial Hearing were: October 10, 2001, November 16 & 21, December 6 & 13, 2001. Other dates scheduled, but had to be canceled at the request of the parties were: August 30 & 31, 2001, October 11& 12, 2001, November 14, 21 & 27, 2001, due to attempts to settle the matter, scheduling conflicts and the availability of the Parent's witnesses. The District requested additional information from a witness, which resulted in a delay in filing of briefs and issuing the decision.

Witnesses called at the impartial hearing were: Ms. Susan C., Resource Advocate, Jane R., Mathematics Tutor and Grandmother, William V.C., Administrator and Teacher at the Kildonan School, Jennifer L. E. C., District's Speech Therapist, Christina F., Assistant CSE Chairperson, Louis S., District's Special Education Teacher, Kldeva T., District's Multisensory Reading Teacher and Phoebe L., Psychologist and Independent Contractor.

Appendix D

Statement of the Issues

The parents of BW, a student with a disability, residing in the Kingston City School District are challenging the special education program recommended by the Committee on Special Education [CSE] for the 2001-2002 school year. The date of the request for an impartial hearing was July 2, 2001.

The issue identified in the parents' letter were:

[1] the individual education program developed in the June 6, 2001 CSE meeting is not an appropriate placement for B.

[2] requests reimbursement for all costs associated with the impartial hearing, including but not limited to attorney fees, transportation and tuition.

[3] requests a special education private school placement

The Respondent School District believes that:

[1] the individual educational program developed at the June 6, 2001 CSE meeting was appropriate to meet BW special education needs.

[2] it is not within the jurisdiction of the IHO to recommend a special education private school placement.

Appendix D

Finding of Fact

BW, a student with a disability, was born on May 21, 1986. At the time of this impartial hearing, he was student attending a private school. Classification was not an issue at this impartial hearing.

Prior to the time of his referral to the Committee on Special Education [CSE]. BW had been attending the High Meadow School, a private school. A speech and language evaluation conducted on September 24, 1993 revealed a severe expressive language delay, moderate receptive language delay and multiple articulation difficulties. [SD # 2]

The referral to the CSE dated October 21, 1993, while BW was in second grade, indicated his "inability to remember letter sounds and word shapes". The referral also indicated that his speech was uninteiligible. The psychological evaluation of November 4, 1993 revealed strengths in the visual motor, spatial and analogic areas, while weak areas were identified in auditory memory, planning and organizing material. His Human Figure Drawing was in the low to average range. A recommendation for a multimodal teaching approach was made. [SD # 3 & 4]

An Individual educational program [IEP] was developed on December 20, 1993 which recommended that BW be classified as learning disabled and speech impaired. His program was a ten month resource room program and intensive speech/language services, cognitive levels were in the range of average with achievement levels in reading

severely delayed. Mathematic skills were within the average range and his social/emotional skills were age appropriate. [SD # 6]

An annual review was conducted by the CSE on April 21, 1994 and continued the classification of learning disabled and speech impaired. The program recommended was a special class for reading and language arts. He was to receive extensive services in the area of speech/language. He would be mainstreamed in science, mathematics and social studies in a third grade class. At the time of this review, BW's reading skills were at the kindergarten level with no independent writing skills. BW left the District's program and was home schooled sometime in February, 1995. [SD # 7]

In his fourth grade placement, BW's progress in reading and writing remained minimal, while mathematic skills appear to be within the range of average for his grade, cognitive skills were in the low average range. BW continued to exhibit severe language deficiencies. [SD # 10, 11, 12 & 13]

On July 19, 1995, a visual examination was conducted and found that BW's visual perception was below age expectancy and recommended an intensive review of phonics. This was confirmed in the August 2, 1995 psychological report. The latter found that BW's cognitive scores were a minimal estimate of his true intellectual abilities. His perpetual organization, sequential memory and language problems negatively influenced his verbal scores. [SD # 14 & 15]

During the 1995-96 school year, BW was home schooled. Test data continue to show BW reading and writing skills

seriously delayed while his mathematic skills show continued progress. The IEP developed on May 23, 1996 and revised on October 29, 1996 recommended that he be classified as learning disabled placed in a fifth grade class with resource program and speech services. The resource program would address reading decoding of paragraphs and reading orally. Curriculum and spelling would be modified. [SD # 18 & 20]

The speech report conducted on September 20, 1996 indicated that BW continues to show a severe language delay and this was supported in the November 8, 1996 psychological report which recommended a language based special class placement. [SD # 22 & 23]

On February 24, 1997 the parent refused to send him to the inclusion class and home schooled him. [SD # 26]

In the speech/language evaluation of August 18, 1998, BW continued to demonstrate progress, but his receptive and expressive language skills continued to show moderate delays. [SD # 28 & 32]

In September, 1998, BW attended the Bruderhof School where he received Orton Gillingham instruction. The District offered a placement in their Middle School in a special class with multisensory reading program and speech consulting services. The academic progress report of April 28, 1999, indicates that BW was reading at a mid third grade level, mathematics was at the mid fifth grade level and writing skill were at the third grade level. [SD # 28, 29 30 & 31]

On May 25, 1999, an IEP was developed for BW. His assigned grade at the time of this CSE meeting was eighth

grade. His classification continued as learning disabled with a special class placement [12:1:1] with resource room, speech/language consult and reading instruction [1-1] daily. [SD #33]

The triennial evaluation was conducted on April 7 & 27, 2000. It included assessments in the cognitive, educational achievement and speech/language areas. BW continues to demonstrate a severe word retrieval deficit affecting his ability to follow complex oral directions and formulating grammatically correct sentences. Cognitive testing also indicated a wide discrepancy in the subtest scores as well as a decline in the range of cognitive ability from the previous testing. Achievement levels continued to show a severe delay in reading comprehension and spelling. Word attack, mathematic reasoning and written expression skills had improved. [SD # 4, 6, 10, 36, 37]

On August 25, 2000, the CSE met and reviewed BW's progress. He had completed the eighth grade in the Buderhof School [parent placement]. The CSE recommended continued classification as learning disabled with a placement at Kingston High School in a special class program [12:1:1] with speech services. It was reasoned that deficits in reading and language affect his ability to understand the vocabulary and concepts in the ninth grade curriculum. A settlement agreement between the parents and the school district provided for a multisensory reading program for 2 periods per cycle. [SD#41 & 42]

On October 2, 2000, an audiological evaluation was conducted and determined that BW possessed weaknesses

in auditory decoding, fine resolution abilities, short term auditory memory, sequencing abilities focus and figure ground abilities. The recommendation was for a strong phonic based multisensory teaching program [Orton Gillingham], a small structured classroom where sound could be controlled and an FM system. [SD # 43]

On October 10, 2000, the IEP that was developed for BW, continued to classify him as learning disabled and placed him in a special class [12:1:1] program at Kingston High School with speech/language and multisensory reading services. The parent requested a full Orton Gillingham program and the Kildonan School. BW attended the special class program at Kingston High School for about a month, but left because of behavioral difficulties that were not fully described at the hearing. The parents informed the District that BW would be home schooled until an appropriate placement could be found. [SD # 45,48 & Parents A]

On December 1, 2000, an independent evaluation was obtained and paid for by the District. BW's verbal reasoning standard score was 90, abstract visual reasoning was 109, quantitative reasoning was at 110, short term memory was 87 and the total composite score was 99. His achievement levels continued to show wide discrepancies. Oral reading and comprehension were at about the 6th grade level, silent reading comprehension was at the 4th grade level and written expression was borderline. The recommendations were to continue learning disabilities classification, with a small group language based curriculum [Orton Gillingham] in every subject, intervention with a language therapist and consultation with the classroom teachers. The report was

forwarded to the District on or about November 16, 2000. [SD # 49 & 55, T p 295]

The CSE met on December 19, 2000 to review the latest psychological evaluation, audiological report and home instructions reports. At the January 11, 2001, CSE meeting, the Committee recommended that BW's home tutoring continue in English, global studies and business practices. The parent was to observe the High School 12:1:1 integrated class. The High School Principal denied the request and the parent never visited the program. [SD # 50, 55, 56, 57, 58, 59, 62, 64 & 65]

On January 4, 2001, an Agreement was reached between the parties in which the District agreed to provide "1-2 periods of Orton Gillingham instruction by a District provider". [SD#55]

The parents informed the District on March 12, 2001, that BW's home tutoring did not include the Orton Gillingham and the District did not have an appropriate program and was objecting to the placement. The parents requested an impartial hearing to resolve "the complaints and concerns". The District did not respond to the request for Orton Gillingham services nor did it respond to the request for an impartial hearing. To my knowledge the parent did not withdraw her request for an impartial hearing. The District did indicate that a visit to the High School was to be arranged for Dr. L. [SD # 61 & 63]

On June 6, 2001, the CSE again met and developed an IEP for BW. They determined that his classification should

continue as a learning disabled child. His placement would be at Kingston High School in a special class [12:1:1], in a full time regular classroom with speech/language [1:1], 1 weekly cycle 30 minutes in a special location. He would also have speech/language indirect services, 1 weekly cycle for 40 minutes in the regular classroom. Reading would be provided as a [1:1] direct service on a once weekly cycle for 30 minutes in a special location with a multisensory consultation to the regular teachers on a once weekly cycle for 40 minutes. The rationale for the placement was that BW's difficulty in auditory processing affects his ability to understand and process new concepts. [SD # 66, T pp 33-34]

On July 2, 2001, the parents again requested an impartial hearing, disagreeing with the June 6, 2001 IEP. [SD # 67]

Rationale/Conclusion of Law/Decision

Background

BW was described as a student with a long standing language based learning disability whose numerous cognitive and speech/language evaluations support this claim. BW attended both private schools [parent placements] and District programs. His private school placements occurred during the K, 1st and part of 2nd grade and again in grades 5-8. He also was home schooled and received homebound instruction during some of the time of his schooling. [SD # 66 T p 268]

Early evaluations indicate BW's cognitive ability to be within the average range, though his scores declined in some

recent evaluations. These evaluations identified major areas of weaknesses in auditory processing and memory. Other weaknesses were in his sequencing abilities and his distractibility to figure ground sounds. [SD # 43 & 66]

BW's improvements have been in articulation, mathematics, expressive and receptive language [though still delayed] and in word attack. He continues to make progress in his basic skill areas of reading and writing, though he still lags in the basic skill areas compared to a student who is chronologically a tenth grader. BW is expected to participate in all State wide tests and achieve a high school Regents diploma.

BW first entered the Kingston High School during the 2000-2001 school year. Prior to the 2000-2001 school year, BW received Orton Gillingham instruction in a private school and had shown progress in that program. His teacher stated that his language interferes with the more specific vocabulary in his instruction. On August 25, 2000, the CSE developed an IEP and recommended a placement in a special class [12:1:1] with speech/language services and later added a multisensory reading services. BW attended district's program for approximately one month. Home instruction was provided by the District sometime in January, prior to that time, he was home schooled. [SD # 41, 42, 46, 47, 48 & 55]

At the October 10, 2000 CSE meeting, the Committee recommended continuation of the previous placement and program, with a Behavior Assessment/Behavior Implementation Plan [to] be completed and implemented to address the behavioral concerns he demonstrated during the

one month he was in the High School program. The record does not indicate that this was ever completed. It was noted in the CSE minutes that the parent disagreed with the recommendation. It is unclear from the minutes, if the parent's disagreement was with the placement/program or the Behavior Assessment. Nonetheless, the District was obligated to conduct such an assessment given BW was in crisis and his behavior was interfering with his learning as well the education of others. At a minimum, the District should have offered out reach social work services and or transition counseling to support his return to the High School. [SD # 45,CR 200.1 [r], CR 200.4 [b][1][v],[d][3][i]]

The Committee met again on December 19, 2000 and reviewed Dr. L.'s report, which included both cognitive and educational achievement testing. The District's response to Dr. L's recommendations was that the District's special education teachers used a multi-modal approach in their classroom and those strategies could be shared with the regular education teachers. The District's program was never identified as a language based curriculum such as the Orton Gillingham program as recommended by Dr. L. There was no further mention of a Functional Behavior Assessment or the Implementation Plan which could serve as part of BW transition process back to the High School. The parent was asked to visit the High School inclusion class and the CSE recommended continuation of home instruction. [CR 200.4[3][1]

The followup meeting on January 11, 2001, it was reported that the Principal had denied Mrs. W. the opportunity to observe the inclusion program and indicated that she now

wanted Dr. L. to observe the class. Home tutoring was to continue. There was no revised IEP to indicate that BW's program had been changed. The CSE minutes did not include Dr. L's evaluation in the list of reports that it would base its decision. Discussion at that meeting, indicated that BW was being considered for the High School inclusion class, which would be a change in his special education program. In considering this change in program, the Committee needed to consider the current information and evaluations [including Dr. L's evaluation and the Audiological examination] before reaching any final decision on this matter. [SD # 50 & 57, CR 200.4[d][2], CR 200.4[6][iii][iv][vii][xi]

Conclusions of Law/Decision

The IEP in question was the one developed on June 6, 2001 with a projected starting date of September 5, 2001. Up to this point, BW was in a District home tutoring program [business practices, English, science and global studies]. His grandmother, a former mathematics teacher, provided the mathematics instruction. It is not clear whether any credit was given for the work he did in mathematics. He missed the first part of global studies and English and he will need to 'retake some coursework in September'. He passed the English Regents which was given in four parts [February-June] BW had accumulated one and half credits towards his high school diploma. He is considered a ninth/tenth grade student. The IEP states that the extent BW will participate in regular education is 'Participates in all areas' and a 'Total Regular Class Program'. BW designation is as a 9/10 grade student. Does this mean he takes both 9th and 10th courses. No mention as how his reading and speech/language services

will be incorporated in his 8/9 period day at the High School. This absence of specificity as to what his course selections would be for the 2001-2002 school year does not provide the parent with an accurate IEP of how her son B will have his needs met nor does it show how the services will impact his program. [SD # 66, Parents A, T pp 71-73, 93, 129, 317-318 & 323]

The central issue in this appeal is the appropriateness of the program and services recommended by the CSE on June 6, 2002 for the 2001-2002 school year. To meet this burden the respondent must demonstrate that the recommended program is 'reasonably calculated to allow the child to receive educational benefit'. Benefit is defined as being able to pass his courses and move on to the next grade. [Board of Education Hendrick Hudson CSD V. Rowley 458 US 176] To meet the Rowley standard more than a minimal benefit is required for a program to be considered appropriate. [Polk V. Central Susquehanna Intermediate Unit, 853 F2d 171 [3d Cir. 1988]] Furthermore, the recommended placement, program and services is to be in the least restrictive environment. [CR 200.6[a][1]]

"The IEP meeting serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs and what the anticipated outcomes may be". [34 CFR 300, Appendix C, [1][a] Purpose of the IEP]

The June 6, 2001 CSE meeting included the required members as well as a parent advocate, speech/language

teacher and the multisensory reading teacher. Of the people who were present at the meeting, only his tutor had any extensive knowledge of BW's current educational needs. The multisensory teacher saw him once and testified that she had 'limited experience with B'. She relied on his testing. The speech/language teacher also testified that she never evaluated B, saw him once to get acquainted and never observed him in class or in his home instruction. The relevance of the above was a student who possessed severe deficits in receptive language and processing difficulties that have affected his ability to learn throughout his schooling. Though an observation is not required for the triennial evaluation, an observation is needed prior to the recommendation of a significant change of placement. In my view, a significant change of placement was made when BW's program was changed from a self contained special education class to home tutoring and then to an "integrated full time regular education class" with up to 12 other special education students and an untold number of regular education students. [SRO 93-15, T pp 135-137, 219-220, 242]

The determination of the special education required for BW shall include a variety of assessment tools and strategies, including information provided by the parent, to gather relevant functional and developmental information about the student and information related to enabling the student to participate and progress in the general education curriculum. In Briggs, the Court reasoned that while mainstreaming is an important objective, the presumption in favor of mainstreaming must be weighted against the importance of providing a student with a disability an appropriate education. [Briggs & BOE 882 F2d 688 [2nd Cir. 1989], CR 200.4 [b][1][6][iii][vii][vi]]

Appendix D

The evaluation process must include at least a physical examination. On October 2, 2000, BW received a physical examination in the form of an audiological evaluation, in which auditory processing weaknesses were noted. His weaknesses were in "fine auditory resolution, separation of speech from noise and short term memory and sequencing". Primarily, he needed to be taught with a strong phonics-based, multisensory teaching program". The report further indicated that a "full Orton Gillingham program is clearly the type of program that would benefit him". "He needs to be placed in a sound controlled environment [small structured classroom] with as [much] one to one teaching environment as possible". "The use of a personal FM system or a sound field FM or Infra-Red system would also be especially helpful to B". [SD # 43] This report was not listed on the IEP as one that the Committee's decision was based. The Chairperson of the CSE testified that the speech therapist would determine the need for the FM trainer. [T pp 61-62] The CSE and not the speech therapist was responsible for determining the need for assisstive technology especially if the device would increase, maintain or improve the functional capabilities of a student with a disability. The CSE could have determined that a FM system evaluation would be arranged in order to determine the effectiveness and appropriateness of such a device, instead the IEP states that 'assisstive technology equipment is not recommended at this time' and gave no further explanation on how it came to that decision. [34 CFR 300.347 [a] [3], 300.5, CR 200.4 [b][1] SD # 66]

The reevaluation process must include the cognitive and achievement evaluation conducted by Dr. L which recommends, as does the audiological evaluation, a language

based, multisensory teaching program. The June 6, 2001 IEP states that BW's "difficulties in auditory language processing affects B.'s ability to understand and process new concepts". "B has demonstrated significant educational difficulties which preclude his participation in the requirement of a second language". B's reading comprehension level on both the April 7, 2000 and November 17, 2000 indicate that he tests in the range of the 10th and 19th percentile. His silent reading comprehension was below fifth grade level. His spontaneous writing skills are in the fifth percentile. The IEP states that 'B is capable' but has difficulty putting information together. Due to B's auditory language processing a number of special consideration would have to be made for him. I find that the District did not identify BW current level of performance. With regards to Dr. L's testimony, I find that her testimony did not deviate much from her report so I reject the Respondent's statement that I should give no weight to her testimony. [CR 200.4[b][4], SD # 43, 49 & 66, T pp 361-366]

The 2001-2002 IEP calls for multisensory reading on a [1-1] one time weekly cycle for 30 minutes in a special location. Testimony heard from the Parent's expert witness that the Orton Gillingham standards are for 40 to 60 minutes twice a week. He found that the 6 day cycle unacceptable. [T PP 329-31] The District's witness also stated that 'typical Orton Gillingham tutorial session is 40 minutes to an hour, depending on scheduling, that's the length of a typical lesson with all the elements'. She further stated that she would schedule BW for a 40 minute High School period. She couldn't tell 'how the program would be implemented until the mastery level of 3 D is known'. [T pp 149, 162-163]

Appendix D

Prior to the June 6, 2001 CSE meeting no assessment was conducted by the District regarding his progress in the Orton Gillingham 3 D level. It is inconceivable how the CSE could have developed a complete set of goals and objectives without conducting an assessment as to where BW placement was in the Orton Gillingham program. [T p 163]

The Petitioner requests that I order the District to place BW in a private special education school. Such an order is beyond my jurisdiction and more appropriate for another venue.

In summary, 'an appropriate program begins with an IEP which accurately reflects the results of evaluations to identify the child's needs. . . .' The CSE failed to observe BW in his then current placement. It failed to develop an IEP when he entered the District's home tutorial program. It failed to consider with the intent of taking action on the two independent evaluations, namely the audiological and Dr. L's psychological and educational evaluation. It failed to provide for an assisstive technology evaluation. It failed to consider private school placements as an option. It failed to provide transition services when BW left school. It failed to provide the necessary frequency and duration that BW required in his language based reading and language arts program. Given the above, the IEP developed on June 6, 2001 was inappropriate and would not meet BW's individual needs. [SRO 93-48]

Appendix D

Decision

It is recognized that the District made a good faith effort for many years, but the issue at hand is whether or not the CSE developed an appropriate IEP following the appropriate procedures. I find that it did not. Furthermore, given that BW is designated as a high school student and that time is running out for him to learn the skills to be an independent learner, given the severity of his language processing deficits in reading comprehension, spelling and writing, I conclude that BW continues to requires a language based curriculum as well as language remediation as recommended in the audiological and psych educational evaluations mentioned above. I find that the IEP developed on June 6, 2001 was not reasonably calculated to ensure benefit to meet his educational needs. I, therefor sustain the Petition's appeal in part and order the following:

[1] an assessment of BW's Orton Gillingham program to determine his exact level.

[2] revise the IEP so that the frequency of the Orton Gillingham instruction provided is consistent with BW needs and the standards established for the implementation of such a program.

[3] develop a transition plan for his reentry into the High School.

[4] review SW's course credits including his home tutoring work and develop an appropriate IEP that includes his schedule of courses for the remainder

of the 2001-2002 school year. If transition services are required for BW to 'catch up' due to the delay of this hearing process, those services shall be provided.

[5] develop a written program for the training of the mainstream teachers in order to ensure that the language based curriculum is incorporated in their instruction of BW.

[6] conduct a behavioral assessment and a behavioral implementation plan.

[7] provide for an assisstive technology evaluation.

[8] the CSE shall consider private school placement in its deliberation.

Within thirty days after the date of this decision, the CSE shall recommend the appropriate services to the child consistent with the tenor of this decision.

A review of the decision of a hearing officer may be obtained by either party by an appeal to a State review officer of the State Education Department. Such a review shall be initiated and conducted in accordance with the provisions of part 279 of this Title.

George Kandilakis
s/ George Kandilakis
Impartial Hearing Officer
March 6, 2002